Supreme Court, U.S.
FILED

97 - 265 AUG 11 1997

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1997

Martin O. Gjerde,

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTION PRESENTED

Is the United States the target of a conspiracy to defraud for purposes of Title 18 U.S.C. § 371 where a city was defrauded, by virtue of a violation of a state imposed loan requirement, of funds granted to the city by a state agency, which received the funds as entitlement grants from the Federal Government for discretionary distribution to local communities pursuant to federal regulations that were not violated?

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PETITION FOR WRIT OF CERTIORARI

Martin O. Gjerde respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 7, 1997, because the Eighth Circuit ignored binding United States Supreme Court precedent on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is published at 110 F.3d 595 (8th Cir. 1997). By order filed May 12, 1997, the Eighth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. A-23.

JURISDICTION

On November 27, 1995, petitioner Martin O. Gjerde was convicted of conspiring to defraud the United States in violation of Title 18 U.S.C. § 371, in United States District Court for the District of Minnesota. Gjerde filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit, which affirmed Gjerde's conviction in an opinion filed on April 7, 1997. In an order filed May 12, 1997, the Eighth Circuit denied Gjerde's timely-filed petition for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of denial of the petition for rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED IN THIS CASE

Title 18 U.S.C. § 371 provides:

> **Conspiracy to commit offense or defraud the United States.** If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Appellant Martin O. Gjerde ("Gjerde") was convicted by a jury on November 27, 1995 of conspiring with Clark and Richard Field to defraud the United States of America of $282,000 belonging to the United States of America's Department of Housing and Urban Development ("HUD"), in violation of Title 18 U.S.C. §371. App. A-1. Gjerde was sentenced on April 4, 1996 to the custody of the Attorney General for 33 months and ordered to pay $5,000 in restitution to the State of Minnesota. App. A-29. The Eighth Circuit Court of Appeals affirmed Gjerde's conviction, *United States v. Gjerde*, 110 F.3d 595 (8th Cir. 1997), and subsequently denied his petition for rehearing on May 12, 1997. App. A-23.

For purposes of this petition only, Gjerde accepts the facts set forth in the court of appeals' opinion, *Gjerde*, 110 F.3d at 597-599, and admits that the evidence presented at trial was sufficient to find him guilty of participating in a conspiracy to defraud. The issue for purposes of this petition, however, is whether the United States Government was the target of the conspiracy to defraud, as is required under Title

18 U.S.C. § 371, as opposed to the City of Clarkfield, and possibly the State of Minnesota.

The charges in this case arose from a conspiracy to allegedly defraud the United States Government and obtain HUD funds. Each year, the United States Congress appropriates tax dollars to HUD for the Community Development Block Grant Program, which includes the Small Cities Grant Program. As a part of this program, HUD releases entitlement grants, not loans, to the states, which in turn grant the funds to communities to establish new economic development. The Minnesota Department of Trade and Economic Development ("MDTED") is the Minnesota agency which has the discretion to disburse these grants to the various cities, in accordance with HUD rules and regulations. The cities then loan the funds to the successful applicants. MDTED, not HUD, decides which municipalities will receive the grants.

Mr. Gjerde was convicted of conspiring with Clark and Richard Field ("the Fields") to obtain a $292,000 loan for the Fields' corporation, Clarkfield Drying, Inc. ("CDI"), from the City of Clarkfield ("the city") through the Small Cities Grant Program. Before the city would approve CDI's loan, it required, as did the MDTED, that CDI show proof of $292,000 in private funding. These "matching funds" were not required by HUD, or any federal law, but instead was a condition imposed solely by the state.

Having trouble securing private financing, the Fields sought the matching funds through Gjerde, the Chief Executive Officer[1] of Bonanza Valley State Bank

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[1] The opinion of the Eighth Circuit Court of Appeals erroneously refers to Gjerde as the "president" of Bonanza. *Gjerde*, 110 F.3d at 597. It is clear that he was the Chief Executive Officer (T. III, 186). This error is irrelevant to this petition, but had some relevance to the fact finding process because it was clear that the president of Bonanza had approved the MCI loan.

("Bonanza"). Gjerde at first refused to lend the funds to CDI, primarily because it was outside Bonanza's service area. The Fields then created Minnewaska Capital Investment, Inc. ("MCI"), a holding and leasing company for CDI located in a city within Bonanza's service area. Bonanza and Gjerde then approved a $292,000 loan to MCI, which in turn loaned the $292,000 to CDI. CDI then paid $173,000 of the loan back to MCI, which paid the money to Bonanza as partial repayment on the loan. The remaining amount of the loan was placed in CDI's account at Bonanza, and Gjerde placed a hold on the account. The loan to MCI essentially was granted only on the basis that the loan proceeds never leave the bank -- hence it was referred to as a "paper transaction."

Several months after the loan transaction was complete, Gjerde told the city attorney that Bonanza had lent $292,000 to MCI, which in turn loaned the money to CDI, and he provided the city attorney with the loan documentation. Gjerde allegedly never told the attorney that the loan, due to the holds placed on the account, was merely a paper transaction. According to the city attorney, Gjerde also falsely told him sometime later, but before the city loan to CDI had been completed, that the Fields had spent the entire amount of the Bonanza loan on equipment for CDI. Thus the paper loan transaction constituted the heart of the claimed fraud and Gjerde's role in the conspiracy. Nothing in the record indicates that Gjerde had any contact with, or made misrepresentations to, HUD or any other federal agency.

Gjerde was charged with four counts of mail fraud and conspiracy, under 18 U.S.C. §371, to defraud the United States of $292,000 of funds belonging to HUD. Gjerde was acquitted of the mail fraud charges, but was convicted on the conspiracy charge.

On appeal, Gjerde asserted that he was not guilty of conspiring to defraud the United States because the city, not the United States or any agency thereof, was the target of any

conspiracy. The United States Court of Appeals for the Eighth Circuit, however, affirmed Gjerde's conviction, holding that "a reasonable jury could have concluded that the target of the conspiracy was HUD, as represented by MDTED, the state agency that administered the HUD Small City Grant Program funds." *United States v. Gjerde*, 110 F.3d 595, 601 (8th Cir. 1997). While the court acknowledged that the HUD money was granted to the state, the court nonetheless found a conspiracy to defraud a federal agency because the grant funds were subject to substantial federal regulation, and thus did not lose their federal character. Id. The court concluded that "MDTED was acting as an agent of HUD, and any conspiracy to defraud MDTED with regard to the HUD Small Cities Grant Program funds was in effect a conspiracy against HUD itself." Id. The court further stated:

> [I]t is of no consequence that the HUD money eventually passed through the city's hand before making its way to CDI; the important fact is that the federal government was the target of the conspiracy between the Fields and Gjerde.

Id.

Gjerde's petition for rehearing and suggestion for rehearing en banc specifically raised the conflict between the court of appeals' ruling in *Gjerde* and this Court's binding precedent in *Tanner v. United States*, 483 U.S. 107 (1987). Without opinion, the petition for rehearing and suggestion for rehearing on banc were denied by the court of appeals on May 12, 1997.

REASONS FOR GRANTING THE WRIT

I. BY IGNORING AND FAILING TO DISTINGUISH THE HOLDING IN *TANNER v. UNITED STATES*, THE EIGHTH CIRCUIT COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT DIRECTLY CONFLICTS WITH RECENT PRECEDENT OF THIS COURT.

The Eighth Circuit Court of Appeals' opinion in *United States v. Gjerde*, 110 F.3d 595 (8th Cir. 1997) ignored this Court's unanimous decision in *Tanner v. United States*, 483 U.S. 107 (1987). Because *Tanner* is binding precedent for the Eighth Circuit, and in order to prevent confusion among the Circuits regarding this Court's decision in *Tanner*, granting certiorari in this case is vital.

Gjerde was convicted of conspiring with the Fields to defraud the United States of $282,000 in HUD funds. His sole participation in the alleged conspiracy was creating a loan on Bonanza's books and misrepresenting the nature of the loan to the city; thus allowing the Fields to claim they had matching funds to comply with the city and state matching funds requirement. There was no other involvement by Gjerde in the transaction, and no federal regulation was violated.

In reaching its decision in this case the court of appeals, while citing *Tanner* for a collateral proposition, not only failed to discuss the holding in *Tanner,* but did not distinguish *Tanner* from this case. *Tanner* is the controlling case on the issue presented. The facts in *Gjerde* are more compelling for petitioner than the facts in *Tanner*, which led this Court to hold that the United States was not the target of a conspiracy.

In *Tanner*, this Court held that to establish a conspiracy to "defraud the United States" under the second clause of Title

18 U.S.C. § 371, the government must prove that the target of the fraud was the United States or an agency thereof, and that a recipient of federal financial assistance and supervision is not an agent of the United States for purposes of § 371. *Id.* at 128-132. In *Gjerde*, however, the Eighth Circuit ignored this Court's holding in *Tanner* and held that a city receiving federal entitlement grants, through a state agency, is an agent of the United States for purposes of § 371. This directly contradicts this Court's holding in *Tanner*, compelling certiorari in this case.

Tanner involved a loan from the Federal Financing Bank to Seminole Electric Cooperative, Inc. ("Seminole"), a corporation owned and operated by eleven rural electric distribution cooperatives, to construct a large power plant in Florida. 483 U.S. at 110. The loan to Seminole was guaranteed by the Rural Electrification Administration ("REA"), an agency of the United States Department of Agriculture. *Id.*

Tanner and a Seminole manager engaged in a criminal conspiracy in connection with Tanner's contracts with Seminole to supply materials and services for the construction of the power plant's roads. *Id.* at 111-112. The loan agreement between Seminole and the REA provided for federal supervision of the construction of the plant, including supervision of the construction and equipment of the electrical system, and inspection, examination, and testing of all work and materials related to the project. *Id.* at 110. Tanner's contracts with Seminole were paid with money guaranteed by the REA, and the contract for building the road was directly approved by the REA. *Id.* at 111.

Tanner, like Gjerde, was convicted of conspiracy to defraud the United States in violation of Title 18 U.S.C. § 371. *Id.* at 112-113. This Court reversed Tanner's conviction, holding that a conspiracy to defraud a recipient of federal financial assistance and supervision was not a conspiracy to

defraud the United States or an agency thereof, for purposes of Title 18 U.S.C. § 371. *Id.* at 128-132.

In *Gjerde*, the court of appeals based its decision on the same arguments advanced by the government, and rejected by this Court, in *Tanner*. The *Gjerde* panel concluded:

> MDTED was acting as an agent of HUD, and any conspiracy to defraud MDTED with regard to the HUD Small Cities Grant Program funds was in effect a conspiracy against HUD itself.

110 F.3d at 601. This is essentially the same position taken by the government in *Tanner*. There, the government "assert[ed] that Seminole, as the recipient of federal financial assistance and the subject of federal supervision, may itself be treated as 'the United States' for purposes of § 371," because,

> Seminole served as an intermediary performing official functions on behalf of the Federal Government, and on this basis a conspiracy to defraud Seminole may constitute a conspiracy to defraud the United States under § 371.

Tanner, 483 U.S. at 129-130. This Court summarily rejected this argument, stating:

> [T]he Government, in arguing that § 371 covers conspiracies to defraud those acting on behalf of the United States, asks this Court to expand the reach of a criminal provision by reading new language into it. This we cannot do.

Id. at 131. Therefore, the *Gjerde* court's conclusion that MDTED was acting as an agent of HUD, and thus was a

federal agency for purposes of 18 U.S.C. § 371, directly conflicts with this Court's holding in *Tanner*.

The Eighth Circuit also improperly relied upon the "character" of the funds involved in reaching its decision in *Gjerde*. The court stated in its opinion:

> Although . . . the HUD money was granted to the state, that grant was subject to substantial federal regulation. Consequently, the funds did not lose their federal character, and MDTED was simply a state agency charged with administering the federal program.

Gjerde, 110 F.3d at 601 (citations omitted). This argument also was expressly addressed and rejected by this Court in *Tanner*. This Court stated in plain terms:

> Given the immense variety of ways the Federal Government provides financial assistance, and the fact that such assistance is always accompanied by restrictions on its use, the inability of the "substantial supervision" test to provide any real guidance is apparent. "A criminal statute, after if not before it is judicially construed, should have a discernable meaning."

Tanner, 483 U.S. at 132 (citations omitted). This Court then held:

> [T]he Government's sweeping interpretation of § 371--which would have, in effect, substituted "anyone receiving federal assistance and supervision" for the phrase "the United States or any agency thereof" in § 371--must fail . . . .

Id. Had Congress disagreed with this Court's interpretation of § 371 in *Tanner*, it has had a ten year opportunity to amend the statute. Thus, it is clear that the Eighth Circuit failed to heed *Tanner* when the court concluded that MDTED was merely an agency of the United States because the grant funds were subject to substantial federal regulation.

Not only did the Eighth Circuit Court of Appeals refuse to follow *Tanner*'s guidance, but the court also based its decision solely on three irrelevant cases that dealt with convictions under 18 U.S.C. § 641, and not § 371, the statute under which Gjerde was convicted. *See United States v. Long*, 996 F.2d 731, 732 (5th Cir. 1993); *United States v. Foulks*, 905 F.2d 928, 930 (6th Cir. 1990); *United States v. Johnson*, 596 F.2d 842, 845-46 (9th Cir. 1979).

The facts in Gjerde's case are even more favorable to him, than were the facts to the defendants in *Tanner*. In *Gjerde*, the United States Government, in this case HUD, was not a party to the loan agreement between the Fields and the City of Clarkfield. Instead, the funds loaned to the Fields by the City of Clarkfield were granted by HUD to MDTED, which then granted the money to the city. HUD did not retain title to the funds once they were granted to the state. Thus, HUD no longer had any stake in the funds, and, even if the loan was not defaulted upon, none of the granted funds would have been repaid to HUD.[2] Additionally, the Fields' loan application was to the City of Clarkfield and not a federal agency. Moreover, the city's grant application was to MDTED and not a federal agency, and the application itself did not refer to the requested funds as belonging to the United States or HUD. Thus, the United States Government was

[2] Minn. Stat. § 116J.873, subd. 4 (currently codified at Minn. Stat. § 116J.8731, subd. 5), requires that the first $100,000 of the loan repayment is kept by the city, which must transfer all repayment in excess of $100,000 to the state's general fund. The funds are not returned to HUD.

three times removed from the loan agreement between the Fields and the City of Clarkfield and could not have been the target of the conspiracy, under *Tanner*, for purposes of 18 U.S.C. § 371.

In contrast to *Gjerde*, the United States Government, through the REA, was a direct party to the loan agreement in *Tanner*. 483 U.S. at 110. Not only was the United States Government a party to the loan, but it also guaranteed the loan through REA. *Id.* at 111. Thus, any money lost as a result of the conspiracy was lost by the United States, whereas, in *Gjerde*, the United States and HUD did not lose any money, since the funds were granted, not loaned, to MDTED.

Furthermore, the United States had substantially more regulation and supervision over the funds involved in *Tanner*, than it did in the present case. In *Gjerde*, the city and state determined who was to receive the funds granted to the state by HUD. The only requirement placed on the city and state was that they follow the various general rules and regulations set forth by HUD. In *Tanner*, on the other hand, the Federal Government had substantial supervision over the loaned money and construction project. The REA itself approved the contract between Tanner and Seminole, and, under the loan agreement, the REA was permitted to supervise, inspect, examine, and test all work and materials relating to the construction of the power plant. Thus, federal regulation and supervision was much more extensive in *Tanner* than in the present case. This further compels the conclusion that *Gjerde* must be decided in accordance with *Tanner*.

In *Gjerde*, the only basis for the conspiracy charge against Mr. Gjerde was the "matching funds" requirement imposed by the city and state, not HUD or the United States. Had the city and state not required the "matching funds" before lending the money to the Fields, there would not have been any basis for any conspiracy charge--federal or state--against Mr. Gjerde. Therefore, because the "regulation" that

served as the basis for the conspiracy charge against Mr. Gjerde was imposed by the city and state, and not by HUD or the United States, only the city or state can be deemed a target of the alleged conspiracy in this case.

Further proof that the city or state, and not HUD or the United States, was the target of the alleged conspiracy is the order of restitution in this case. Along with a 33 month prison sentence, Mr. Gjerde was ordered to pay $5,000 in restitution to the State of Minnesota. App. A-29. He was not required to pay restitution to HUD or the United States, but only to the State of Minnesota. Had the money actually belonged to the United States, Gjerde would have been ordered to pay restitution to the Federal Government, and not the state.

Furthermore, CDI's bankruptcy proceeding, which followed the default on the city's loan, provides additional proof that the United States was not the target of the alleged conspiracy. In that proceeding, only the City of Clarkfield filed a claim. Neither HUD, nor the United States, filed any claim, thus indicating that the United States acknowledged that it did not have title to any of the lost funds. This precludes a determination that the United States was the target of the conspiracy, or that MDTED was merely acting as an agency for the United States Government.

Finally, the language of the indictment in *Gjerde* is much more explicit than was the indictment's language in *Tanner*. In *Gjerde*, Count I of the indictment alleged that Mr. Gjerde:

> conspired, confederated and agreed together with Clark Beach Field and Richard Field . . . to defraud the United States of America of funds belonging to the United States of America's Department of Housing and Urban Development, with the object of the conspiracy being to obtain those funds in the form of approximately $282,000 loan . . . .

App. A-42–43 (emphasis added). The indictment in *Tanner*, however, broadly charged Tanner with conspiring

> to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program.

483 U.S. at 128-129 (emphasis added).

The rationale of *Tanner* is even more persuasive here because the indictment in *Gjerde* is more specific than the indictment in *Tanner*, in that the *Gjerde* indictment alleged that the theft of "funds belonging to the United States" was the object of the conspiracy. App. A-42 (emphasis added). Thus, the indictment was incorrect in that it alleged that the funds were still owned by the United States, when it was clear that this was not true. Had the indictment alleged impairment of a lawful governmental function, then the fact that the United States no longer had title to the funds granted by HUD might not be as significant as it is in this case. The Eighth Circuit, however, cannot expand the government's indictment by overlooking this Court's precedent and holding in *Tanner*.

A side-by-side comparison of the salient facts in *Tanner* and *Gjerde* conclusively demonstrates that if there were no conspiracy to defraud the United States in *Tanner*, it is beyond question that there was no such conspiracy in Gjerde's case.

GJERDE	***TANNER***
• Federal assistance provided by U.S. agency (HUD) when it granted entitlement funds to state which granted funds to city which lent them to a private corporation (CDI).	• Federal assistance provided by U.S. agency (REA) when it guaranteed a bank loan to a private corporation (Seminole) pursuant to federal guaranteed loan program.
• Federal regulations governed the state's administration of the entitlement grants.	• Federal regulations governed the administration and enforcement of the guaranteed loan program.
• Court of Appeals claimed state acted as agent of HUD in administrating federal program.	• Government claimed private corporation served as intermediary (agent) performing official function on behalf of REA.
• HUD (or U.S.) not a party to any loan agreements.	• REA (or U.S.) approved loan and were signators and guarantors of the loan.
• No evidence of HUD specific oversight or supervision.	• REA had right to (and did) supervise loan project, approve certain contracts, and require certain bidding procedures.

• Only evidence of fraud was the violation of a state -- not a HUD – requirement (matching funds).	• Fraud included violation of REA required bidding procedures.
• No financial risk to HUD if loan in default. Only city and state had right to repayment.	• If loan defaulted, REA at complete risk as loan guarantor.
• Restitution ordered to state -- not federal government or HUD.	• No comparable fact.
• Only city filed bankruptcy claim as creditor of private corporation (CDI).	• No comparable fact.
• Indictment alleged conspiracy to defraud U.S. of $282,000 belonging to HUD.	• Indictment alleged conspiracy to defraud U.S. by impeding, impairing, obstructing and defeating lawful function of REA.

If the court of appeals had considered the rationale for the holding in *Tanner* and compared the above enumerated facts in *Gjerde* with those in *Tanner,* it certainly should have reversed Mr. Gjerde's wrongful conviction.

The Court of Appeals' failure to follow this Court's holding in *Tanner* compels the grant of certiorari in this case. This Court should not permit the Eighth Circuit to stray from established and binding precedent. Allowing the Eighth Circuit to do so in this case would undermine this Court's

authority, and effectively grant the Eighth Circuit, and all other circuit courts, permission to deviate from this Court's salutary precedent which prevented the expansion of "the reach of a criminal provision by reading new language into it." *Tanner*, 483 U.S. at 131. Therefore, certiorari is appropriate and critical in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 8, 1997

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2033MNMI

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	District of Minnesota
Martin Ole Gjerde,	*	
	*	
Appellant.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 7, 1997

A true copy.

ATTEST: s/Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-2033

United States of America,	*	
	*	
Plaintiff - Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota
Martin Ole Gjerde,	*	
	*	
Defendant - Appellant.	*	

Submitted: November 20, 1996
Filed: April 7, 1997

Before FAGG, WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Martin O. Gjerde appeals his conviction for conspiring to defraud an agency of the United States in violation of 18 U.S.C. § 371 (1994). He argues that the evidence was insufficient to support his conviction, that the district court[1] erred in admitting hearsay evidence at his trial, and that the district court erred in determining his sentence. We affirm.

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

I.

The charges in this case arose from a conspiracy to defraud the United States Department of Housing and Urban Development (HUD) in order to obtain HUD funds. The United States Congress annually appropriates tax dollars to HUD for the Community Development Block Grant Program, which includes the Small Cities Grant Program. HUD releases the Small Cities Grant Program funds to the states, which in turn make the funds available to communities to establish new economic development. The Minnesota Department of Trade and Economic Development (MDTED) is the Minnesota agency in charge of disbursing these HUD funds, in accordance with HUD rules and regulations.

Clarkfield Drying, Inc. (CDI) was a Minnesota corporation established by two brothers, Clark Field and Richard Field, to operate a whey drying plant located in Clarkfield, Minnesota. The Field brothers sought financing for the purchase of equipment and for other operational costs for the new plant. On behalf of CDI, the brothers approached the City of Clarkfield to apply for a $282,000 loan through the HUD Small Cities Grant Program. In their application for the HUD funds, the Field brothers stated that to be successful, CDI would require, among other things, an additional $292,000 of private financing. When the city applied to MDTED for the purpose of loaning the funds to CDI, MDTED responded that before it would release the HUD funds, it would need proof through a loan commitment letter that CDI had obtained the private financing. In addition, under the funding agreement between the city and CDI, CDI would have to prove that the money from the private financing had been spent on CDI equipment and that the City of Clarkfield would be in the first security position on the CDI equipment.

The Field brothers proceeded to seek private financing for CDI. After unsuccessfully pursuing other avenues of obtaining the money,[2] the Field brothers sought a $292,000 loan from the Bonanza Valley State Bank (the bank) in Brooten, Minnesota. Richard Field approached Martin Gjerde, the president of the bank who had a longstanding relationship with Field, for a loan. Gjerde refused to loan the funds to CDI, however, because the City of Clarkfield was out of the bank's service area (90 miles away), CDI was a new company, and Gjerde had no experience with Clark Field, who was to run the operation.

Clark and Richard Field then proceeded to create a corporation named Minnewaska Capital Investment, Inc. (Minnewaska), in Glenwood, Minnesota, a city within the bank's service area. Minnewaska was a holding and leasing company for CDI, with Richard Field named as president and Clark Field named as treasurer. The Fields then approached Gjerde for a $292,000 bank loan to Minnewaska, to provide private financing for CDI. Gjerde approved the loan, without requiring the Fields to fill out a loan application or to submit any evidence of Minnewaska's financial status.

The transactions between Gjerde (on behalf of the bank) and the Fields (on behalf of CDI and Minnewaska) took place on August 21, 1989, and proceeded as follows. First, the bank loaned $292,000 to Minnewaska. The loan papers were signed by Gjerde, Clark Field, and Richard Field. Next, Minnewaska immediately transferred the $292,000 to CDI.

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[2] At one point, Clark and Richard Field obtained a false letter of credit from Rudell Oppegard, the president of Twin Valley State Bank in Twin Valley, Minnesota, conditionally committing the bank to a $292,000 loan. As a result of their conspiracy to obtain HUD money through fraudulent means, Oppegard and the Field brothers were convicted of conspiring to defraud the government in violation of 18 U.S.C. § 371. See United States v. Clark Beach Field, No. 96-1588 (8th Cir. Apr. 7, 1997); United States v. Richard William Field, No. 96-1589 (8th Cir. Apr. 7, 1997).

Within a minute of this transfer of funds, CDI paid $173,000 (59% of the loan) back to Minnewaska, which then repaid that amount to the bank. The remaining $119,000 of the bank loan was left in CDI's checking account, but the money was never available for use by CDI. Gjerde put a hold on the Minnewaska and CDI checking accounts, preventing the Fields from accessing the proceeds of the bank loan. He noted this in a comment in the loan file, stating:

> This loan is being granted and security looked at only on the basis that the proceeds of this loan never leave[] accounts that have been set up at Bonanza Valley State Bank and security that is offered for them. Holds have been put on each of [the] checking accounts . . . .

(Appellee's App. at 10.) In accordance with Gjerde's comment on the loan, the bank returned and refused to honor several checks written on the CDI bank account, despite its healthy account balance.[3]

On September 28, 1989, Kevin Stroup, an attorney representing the City of Clarkfield, telephoned Gjerde to inquire about the bank loan. Stroup told Gjerde that, to obtain the HUD Small Cities Grant Program funds, the Fields were required to secure $292,000 of private financing and to show that the proceeds of the financing had been used to purchase CDI equipment. Gjerde informed Stroup that the bank had

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[3] Over a year later, an Assistant County Attorney filed an insufficient-funds check charge against Clark Field based on a check that had bounced in September 1989. Gjerde provided a letter on Field's behalf, explaining that the account was used as security on the bank loan and that the check had been returned for insufficient funds because a hold had been placed on the account. As a result of Gjerde's representations, the charge against Clark Field was dropped.

lent $292,000 to Minnewaska, and Stroup requested documentation of the loan.

Gjerde sent the loan documents to Stroup, showing that the bank had lent $292,000 to Minnewaska, which in turn was transferring the funds to CDI. Gjerde also represented to Stroup on several occasions that approximately $170,000 of the bank loan had been spent on equipment as agreed upon under the funding agreement between the city and CDI. Gjerde never informed Stroup at any time that the $173,000 had in fact been repaid to the bank or that holds had been placed on the CDI and Minnewaska checking accounts to ensure that the remaining $119,000 did not leave the bank.

On November 8, 1989, Gjerde negotiated with Stroup to maintain the bank's first security position on the cash in the Minnewaska and CDI bank accounts until the funds had been fully spent on equipment. Under Gjerde's proposal, the city would have a first security interest once CDI had used the money to purchase equipment for the whey drying plant. The city agreed to this plan because the contract between the city and CDI required that the HUD funds be spent on equipment. On November 29, 1989, Gjerde confirmed to Stroup that CDI had spent all the proceeds of the bank loan on equipment and the CDI account had a zero balance.

Stroup sent the bank loan documents to a senior loan officer at MDTED, Nancy Johnson, and told her of Gjerde's assurance that the proceeds of the bank loan had been spent on equipment. The Fields also sent documents to Johnson, representing that the money had been spent on equipment. Based on this information, Johnson authorized the release of funds from the HUD Small Cities Grant Program to the city. On December 13, 1989, the city loaned $282,000 to CDI, $232,000 of which was transferred to the CDI checking account at the Bonanza Valley State Bank.

The Fields repaid the balance of the bank loan within three months of the execution of the loan. A $115,000 check

was made payable from the CDI account to the bank on November 9, 1989, one day following the consent agreement between the bank and the city concerning the priority of their security interest. The final payment, including $3,571.40 in purported interest, was made on December 13, 1989, after the HUD funds had been deposited in the CDI account.

CDI eventually defaulted on the HUD loan. Stroup's law firm then hired an investigator to identify the whereabouts of the HUD funds. When the investigator spoke with Gjerde about the bank loan, Gjerde described it as a "paper transaction."

The City of Clarkfield also hired a CPA to trace the HUD funds loaned to CDI. The CPA concluded that the $292,000 purported loan from the bank "did not provide any capital on a long term basis to the business, as the money was advanced and returned well in advance of the time it should have been returned either to investors or to the bank." (Trial Tr. III at 39.) The CPA testified that the sequence of the transactions was not necessarily uncommon, but the loan was not valid to fulfill CDI's obligation to obtain the private financing in order to qualify for the HUD funds. She described the purported loan as "a bogus transaction with no actual capitalization to the corporation." (Id.)

On September 21, 1994, Gjerde was charged in a Second Superseding Indictment on one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and four counts of mail fraud in violation of 18 U.S.C. §§ 2 and 1341.[4]

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[4] The Field brothers were also charged in the same superseding indictment with violations of the mail fraud and conspiracy statutes arising out of this conspiracy. In addition, they were charged with similar counts arising out of a separate conspiracy to obtain HUD funds through fraudulent activities with Oppegard, see supra n.2. The Fields were found guilty on the latter charges and then entered into a plea agreement with the United States with regard to the charges arising out of their conspiracy with Gjerde. Under the agreement, the government dropped the mail fraud charges, but the Field brothers pled guilty to the conspiracy charge.

The case proceeded to trial. Stroup, the attorney who had represented the City of Clarkfield, testified that he would not have approved the loan to CDI if he had seen the loan comment sheet prepared by Gjerde stating that the bank loan was being made on the condition that the money never leave the bank. Likewise, Johnson, the senior loan officer at MDTED assigned to the CDI loan, testified that she would not have approved the release of the HUD money to the city if she had seen the loan comment sheet.

A jury found Gjerde guilty of conspiring to defraud the United States in violation of 18 U.S.C. § 371, but not guilty on the mail fraud charges under 18 U.S.C. §§ 2 and 1341. The district court entered a judgment, sentencing Gjerde to thirty-three months of imprisonment, two years of supervised release, and restitution in the amount of $5,000. Gjerde appeals, arguing that the evidence was insufficient to support his conviction, the district court erred in admitting hearsay evidence, and the district court erred in sentencing him.

II.

A. Sufficiency of the Evidence

Gjerde first contends that the evidence is insufficient to prove he was guilty of participating in any conspiracy. We consider the evidence in the light most favorable to the guilty verdict, giving the government the benefit of all reasonable inferences that might be drawn from the evidence. United States v. Koskela, 86 F.3d 122, 126 (8th Cir. 1996). We will overturn a jury verdict only when no reasonable jury could have found the defendant guilty beyond a reasonable doubt. United States v. Reeves, 83 F.3d 203, 205-06 (8th Cir. 1996).

To find Gjerde guilty of conspiring to defraud the United States in violation of 18 U.S.C. § 371,[5] the jury had to conclude that a conspiracy existed in this case and that Gjerde was a participant in the conspiracy. A conspiracy exists when at least two people knowingly participate in an agreement to defraud the United States or a United States agency and at least one of the parties performs an overt act in furtherance of the conspiracy. 18 U.S.C. § 371; United States v. Campbell, 848 F.2d 846, 851 (8th Cir. 1988). Circumstantial evidence, including the alleged conspirators' conduct and any attending circumstances, may prove the existence of an agreement, particularly evidence indicating that the parties "acted in concert to achieve a common goal." Hamling v. United States, 418 U.S. 87, 124 (1974); Campbell, 848 F.2d at 851. Once the conspiracy is established, the government need only offer slight evidence connecting a particular defendant to the conspiracy. United States v. Jenkins, 78 F.3d 1283, 1287 (8th Cir. 1996).

Gjerde claims the evidence was insufficient to establish beyond a reasonable doubt that he knew of the conspiracy or of the conspiracy's general purpose and scope. We disagree. Gjerde knew that the Field brothers needed to obtain $292,000 in matching funds in order to qualify for the HUD money. He also knew the $292,000 bank "loan" to CDI through Minnewaska was merely a paper transaction. Yet, when the city attorney discussed the matching-fund requirement with Gjerde, Gjerde represented that the bank had

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[5] Title 18 U.S.C. § 371 states:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. . . .

provided the requisite private financing and did not explain that CDI had in fact received no capitalization from the loan.

Besides Gjerde's knowledge and misrepresentation about the bank loan itself, Gjerde knew the Fields were required to use the bank proceeds to purchase equipment for CDI. In furtherance of the conspiracy, Gjerde falsely represented that the entire proceeds of the bank loan had been spent on equipment, when in fact they had never left the bank. He also fostered the city's misunderstanding of the nature of the bank loan by negotiating with the city regarding the priority of the security interests, all the while knowing that the bank-loan transaction had provided no capitalization to CDI and there would be no expenditure of the bank-loan proceeds on equipment. It is but a small inferential step from the record evidence to conclude that Gjerde knew the city attorney would rely on the bank-loan documentation and Gjerde's representations, as well as the documentation from the Field brothers, to induce the senior loan officer at MDTED to release the HUD funds to the city. Given the overwhelming evidence in this record, we believe a reasonable jury could have concluded beyond a reasonable doubt that Gjerde knew of the conspiracy's purpose and scope, and that he willingly and knowingly played a key role as a participant in it.

Gjerde argues that, although he did not explicitly tell the city attorney he had frozen the CDI and Minnewaska checking accounts, he nonetheless put the city attorney on notice of this by sending the attorney the bank-loan documents. Included among the documents was an assignment signed by both Clark and Richard Field, which stated: "I understand that I may not withdraw any money from my account without your permission until my debts have been paid." (Trial Tr. III at 141.) Gjerde maintains that this assignment revealed the nature of the bank loan. We cannot agree that the Field brothers' agreement to obtain bank authorization for expenditures put the city attorney on notice that Gjerde had

absolutely frozen the CDI and Minnewaska checking accounts. When reading the assignment, the city attorney could easily have assumed that the bank would approve expenditures for CDI equipment, in accordance with the HUD funding agreement. This assumption would be quite reasonable given that Gjerde had indicated his understanding of the expenditure requirement. Thus, the documentation of the assignment did not notify the city attorney of the holds on the accounts.

Gjerde next argues on two grounds that the evidence was insufficient to support the verdict because the conspiracy was not one to defraud the United States or any agency thereof. First, he contends that the money fraudulently borrowed by the Field brothers was money belonging to the city, not to HUD. Thus, Gjerde argues, the object of the conspiracy was to defraud the City of Clarkfield, not the federal government. Second, Gjerde claims that because no federal statute required the city to impose its matching loan requirement, the conspiracy could not have been to defraud the federal government.

Section 371 prohibits two distinct types of conspiracies: (1) conspiracies "to commit any offense against the United States," and (2) conspiracies "to defraud the United States or any agency thereof." 18 U.S.C. § 371; United States v. Wicker, 80 F.3d 263, 267 (8th Cir. 1996). In the instant case, Gjerde was charged with the second type of conspiracy.[6] To

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[6] The Second Superseding Indictment charged Gjerde with

> knowingly and willfully conspir[ing with Clark and Richard Field] . . . to defraud the United States of America of funds belonging to the United States of America's Department of Housing and Urban Development, with the object of the conspiracy being to obtain those funds in the form of an approximately $282,000 loan from the HUD Small Cities Grant Program . . . .

support a conviction of conspiracy on this charge, the government had to prove that the United States or one of its agencies was the target of the alleged conspiracy. Tanner v. United States, 483 U.S. 107, 130 (1987). A conspiracy targeted at the United States or one of its agencies may be achieved by using third parties to effect the conspiracy, because section 371 does not limit the method by which the conspirators may plan to defraud the United States. Id. at 129.

Based on the evidence at trial, a reasonable jury could have concluded that the target of the conspiracy was HUD, as represented by MDTED, the state agency that administered the HUD Small City Grant Program funds. Although, as Gjerde emphasizes in his briefs, the HUD money was granted to the state, see 42 U.S.C. § 5303,[7] that grant was subject to substantial federal regulation, see id. §§ 5304-5321; 24 C.F.R. 570.420 - .432 (1997). Consequently, the funds did not lose their federal character, and MDTED was simply a state agency charged with administering the federal program. Cf. United States v. Long, 996 F.2d 731, 732 (5th Cir. 1993) (explaining that question of whether funds lose their federal character for purposes of 18 U.S.C. § 641 (conversion of federal funds) is measured by the control and the supervision the federal government exercises); United States v. Foulks, 905 F.2d 928, 930 (6th Cir. 1990) (holding, in the context of a prosecution under 42 U.S.C. § 641, that "[w]here the government retains power over grant funds, those funds retain their federal character even though deposited into accounts of non-federal agencies"); United States v. Johnson, 596 F.2d

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(Clerk's R. at 129.)

[7] This section states:

> The Secretary is authorized to make grants to States, units of general local government and Indian tribes to carry out activities in accordance with the provisions of this chapter. . . .

842, 845-46 (9th Cir. 1979) (holding that HUD funds disbursed to the San Francisco Redevelopment Agency were property of the federal government). Thus, MDTED was acting as an agent of HUD, and any conspiracy to defraud MDTED with regard to the HUD Small Cities Grant Program funds was in effect a conspiracy against HUD itself. Gjerde and the Fields used the city to perpetrate their fraud against HUD, but this does not alter the conclusion that the object of their conspiracy was to defraud HUD in order to obtain the federal funds. Tanner, 483 U.S. at 129. Further, it is of no consequence that the HUD money eventually passed through the city's hands before making its way to CDI; the important fact is that the federal government was the target of the conspiracy between the Fields and Gjerde. See Tanner, 483 U.S. at 130.

We also reject Gjerde's argument based on the fact that the government's case fails because the conspiracy did not violate a federal statute or regulation. That the state (not the federal government) instituted the matching-funds requirement is immaterial to our inquiry, because Gjerde was charged with conspiracy to defraud the United States, not conspiracy to commit an offense against the United States. See 18 U.S.C. § 371. While allegations of a conspiracy to commit an offense against the United States would require proof of an agreement to violate a federal statute or regulation, allegations under the other conspiracy clause, that is, a conspiracy to defraud the United States, do not engender that same requirement. Compare Tanner, 483 U.S. at 128-130 (discussing the intent requirement for a "conspiracy to defraud the United States") with Wicker, 80 F.3d 267 (discussing the intent requirement for a "conspiracy to commit any offense against the United States").

For these reasons, we conclude that the evidence the government submitted to the jury was sufficient to prove

beyond a reasonable doubt that Gjerde knowingly participated in a conspiracy to defraud an agency of the United States.

B. Admission of Coconspirator's Statement

Gjerde contends the district court committed reversible error in admitting testimony concerning a statement Richard Field made to an FBI agent in 1993. "We review the evidentiary rulings of a district court only for abuses of discretion, and will reverse only when an improper evidentiary ruling affects the substantial rights of the defendant or when we believe that the error has had more than a slight influence on the verdict." United States v. Ballew, 40 F.3d 936, 941 (8th Cir. 1994) (citations omitted), cert. denied, 115 S. Ct. 1813 (1995); see also Fed. R. Crim. P. 52(a) (harmless error standard).

The record reveals the following testimony at the trial:

> PROSECUTOR: Now, during the course of your investigation of this case, did you also interview Richard Field?
>
> FBI AGENT: Yes, I did.
>
> PROSECUTOR: And when was that?
>
> FBI AGENT: That interview took place at Mister Field's place of business on July 22nd, 1993.
>
> PROSECUTOR: And did Mister Field tell you anything about why Minnewaska Capital Investment Corporation was set up?
>
> GJERDEIS ATTORNEY: I object, Your Honor. His conversation with Mister Field is hearsay in this trial.

COURT: Overruled, under Bell or [Bourjaily]. Go ahead.

FBI AGENT: Yes -- I believe your question was how Mister Field described Minnewaska Capital Investment?

PROSECUTOR: That is right. What did he tell you about why it was set up and how it was set up?

FBI AGENT: We had an extended conversation with regard to Minnewaska Capital Investments. And the final statement made by Mister Richard Field to me was that Minnewaska Capital Investment was nothing more than a straw company set up to act as a facilitator for the loan from Bonanza Valley State Bank to Clarkfield Drying, Incorporated.

PROSECUTOR: I have no further questions at this time.

(Trial Tr. III at 133-34.)

The district court admitted the FBI agent's testimony about Richard Field's description of Minnewaska under Federal Rule of Evidence 801(d)(2)(E), which states that a coconspirator's statement in the course of and in furtherance of the conspiracy is not hearsay evidence. See Bourjaily v. United States, 483 U.S. 171, 173 (1987); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) (setting forth the procedure for conditionally admitting conspirator statements). Gjerde argues that Richard Field's statement, made more than three and a half years after the Fields obtained the HUD funds, does not fall within the terms Rule 801(d)(2)(E), because it was not made in the course of or in furtherance of the conspiracy. Gjerde further argues that the admission of

the testimony was prejudicial because it indicates Gjerde's participation in an overt act in furtherance of the conspiracy.

The government counters that the admission of Richard Field's statement was not error. The government contends, on the basis of United States v. Askew, 958 F.2d 806, 812 (8th Cir. 1992), that Gjerde bears the burden of proving the conspiracy had actually ended at the time of Field's statement and that Gjerde failed to meet this burden. The government also argues that, if the statement was erroneously admitted, the admission was harmless error. See Fed. R. Crim. P. 52(a).

A declarant's out-of-court statement is admissible under Rule 801(d)(2)(E) if the government proves by the preponderance of the evidence that (1) a conspiracy existed, (2) the declarant was the defendant's coconspirator, and (3) the statement was made during the course of and in furtherance of the conspiracy. United States v. Darden, 70 F.3d 1507, 1529 (8th Cir. 1995), cert. denied, 116 S. Ct. 1149 (1996) and Hopkins V. United States, 116 S. Ct. 2567 (1996). In the instant case, we have already concluded that the government established beyond a reasonable doubt the existence of a conspiracy involving both Richard Field and Gjerde as coconspirators. Thus, the only remaining issue is whether Richard Field's statement was made in the course of and in furtherance of the conspiracy.

As a preliminary matter, we note that the government, not Gjerde, bears the burden of establishing that the statement was made "in the course of" the conspiracy, that is, that the conspiracy had not ended before Richard Field made his statement to the FBI agent in 1993. Darden, 70 F.3d at 1529; Bell, 573 F.2d at 1044. Our discussion in Askew, 958 F.2d at 812, on which the government relies for a contrary allocation of the burdens, relates to a sentencing issue, not the admissibility of evidence at trial under Rule 801(d)(2)(E).

Setting aside for a moment the question of whether Richard Field's statement was made "in the course of" the

conspiracy, we first look at whether the record shows that Richard Field's statement was made "in furtherance of" the conspiracy. We interpret the "in furtherance of" requirement broadly, finding statements to be in furtherance of the conspiracy if the overall effect of the conversation is to facilitate the conspiracy. United States v. Edwards, 994 F.2d 417, 422 (8th Cir. 1993), cert. denied, 510 U.S. 1048 (1994). "[C]onspirator statements made to a known police agent are admissible under Rule 801(d)(2)(E) only if intended to allow the conspiracy to continue, for example, by misleading law enforcers." United States v. Alonzo, 991 F.2d 1422, 1426 (8th Cir. 1993).

After careful consideration, we conclude Richard Field did not make the statement regarding Minnewaska in furtherance of the conspiracy. The statement could not have been made in furtherance of the conspirators' core criminal objective of obtaining the HUD funds, because Richard Field made the statement three and a half years after the Fields actually obtained the money. As to whether Richard Field was trying to conceal the conspiracy, we must consider the statement in isolation, because there is no elaboration in the record on the overall effect of the conversation between Field and the FBI agent. Considering it so, we conclude Richard Field did not make the statement in an effort to conceal the conspiracy, for it was an admission about why the Fields created Minnewaska and it supports the government's case of conspiracy to defraud the United States. Thus, regardless of whether the statement was made in the course of the conspiracy, we conclude that it was not made in furtherance of the conspiracy and therefore was not admissible under Federal Rule of Evidence 801(d)(2)(E).

Nonetheless, the hearsay evidence was admissible under Federal Rule of Evidence 804(b)(3) as a statement against interest. Under Rule 804(b)(3), a statement against penal interest is not excluded as hearsay if "(1) the declarant is

unavailable as a witness, (2) the statement . . . so far tend[s] to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement." United States v. Mendoza, 85 F. 3d 1347, 1351 (8th Cir. 1996). At the time of Gjerde's trial, Richard Field was not available as a witness. He had pled guilty to the conspiracy and had asserted his Fifth Amendment right against self-incrimination pending his appeal. See United States v. Duchi, 944 F.2d 391, 394 (8th Cir. 1991). Richard Field's statement that Minnewaska had been created as a straw company to facilitate the bank loan was against his penal interest at the time he made it, because there was an investigation under way and the statement gave credence to the government's suspicion that the Field brothers had manipulated the situation to make it appear as if CDI had secured private financing from the bank, when in fact the bank "loan" provided absolutely no capital to CDI. Finally, the statement was corroborated by Gjerde's own statement that the loan to Minnewaska passing through to CDI was merely a paper transaction. Thus, the evidence was admissible under Rule 804(b)(3).

Even if the evidence had been inadmissible, the error would have been harmless in this case, because the other overwhelming evidence was more than sufficient to prove Gjerde's participation in the conspiracy beyond a reasonable doubt. The record reveals many acts in furtherance of the conspiracy, including Gjerde's own misrepresentations to the city attorney. Furthermore, given Gjerde's own description of the loan as a paper transaction, Richard Field's statement did not really add anything to the nonhearsay evidence in the record. Thus, we conclude that any evidentiary error regarding the statement would not have affected Gjerde's

substantial rights. Fed. R. Crim. P. 52(a); Ballew, 40 F.3d at 941.

Gjerde also maintains that the prosecutor's reference in his closing argument to Richard Field's statement constituted prosecutorial misconduct. There was no prosecutorial misconduct here, because the evidence was admissible and the prosecutor was therefore free to refer to it in closing arguments. See United States v. Goodlow, 105 F.3d 1203, 1207 (8th Cir. 1997) (standard for examining claims of improper prosecutorial comments).

C. Sentencing Issues

Finally, Gjerde raises several challenges to the district court's calculation of his sentence under the United States Sentencing Guidelines. First, Gjerde argues the district court improperly enhanced his sentence for obstruction of justice on the basis that Gjerde perjured himself at trial. A two-level increase is appropriate "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing or the instant offense." United States Sentencing Commission, Guidelines Manual, § 3C.1.1 (Nov. 1995). It is well established that perjury at trial amounts to an obstruction of justice. United States v. Thomas, 93 F.2d 479, 489 (8th Cir. 1996). "A witness commits perjury if he gives false testimony concerning a material matter with the wilful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." Id. (internal quotations omitted). "The district court must review the evidence and make [an] independent finding, by a preponderance of the evidence, of perjury in order to impose a sentence enhancement for obstruction of justice." Id. In conducting this review, the court must evaluate the defendant's testimony in the light most favorable to him.

United States v. Scott, 91 F.3d 1058, 1063 (8th Cir. 1996). Because a decision to apply an enhancement for obstruction of justice rests on the district court's factual findings, we review that decision for clear error. Thomas, 93 F.3d at 488-89.

The district court's decision in this case was not clearly erroneous. Examining the testimony in the light most favorable to Gjerde, the district court found that Gjerde testified falsely in an attempt to affect the outcome of his case. For example, contrary to a memorandum written by Gjerde indicating that the bank's loan was merely a paper transaction and that he never intended to disburse the funds to the Fields, Gjerde testified at trial that the bank's loan to the Fields was legitimate. Also in direct conflict with the evidence, Gjerde also testified that he did not withhold information from the city's attorney and that the bank intended to disburse the loan to the Fields. Considering these statements, and others, we agree with the district court that enhancement under § 3C1.1 is appropriate, and we find no clear error. Thomas, 93 F.3d at 489; see also United States v. Dunnigan, 507 U.S. 87, 95-96 (1993) (finding an enhancement for obstruction of justice amply supported where the defendant failed to give truthful answers on material matters in an attempt to affect the outcome of the case).

Gjerde also challenges the enhancements of his sentence based upon his role in the offense. The district court applied a two-level enhancement for more than minimal planning, USSG § 2F1.1(b) (2), and a two-level enhancement for abuse of a position of trust, USSG § 3B1.3. Gjerde argues not only that the enhancements were improper, but also that he deserved a reduction because of his minor role in the offense. See USSG § 3Bl.2(b). We review the district court's factual determination of a participant's role in the offense for clear error. United States v. Maxwell, 25 F.3d 1389, 1399 (8th Cir.), cert. denied, 115 S. Ct. 610 (1994).

The district court's decision to apply a two-level enhancement under section 2F1.1(b)(2) of the Guidelines for more than minimal planning was not clearly erroneous. "'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." Id. § 1B1.1(f). Gjerde approved of the bank "loan" to Minnewaska; he put a hold on the Minnewaska and CDI accounts; and he represented that CDI had obtained financing from the bank for the purpose of purchasing equipment and, later, that equipment had been purchased. These acts and others were thoughtful and complex, and extended over a period of several months. The district court did not clearly err in applying the enhancement for more than minimal planning.

Likewise, the denial of Gjerde's motion for a reduction for being a minor participant was not clear error. Gjerde bears the burden of proving that he is entitled to a reduction for being a minor participant. United States v. Thompson, 60 F.3d 514, 517 (8th Cir. 1995). He cannot meet that burden simply by proving that he is less culpable than his coconspirators when the evidence indicates that he was "deeply involved" in the criminal acts. Id. at 517-18. This record demonstrates that Gjerde was a key player in the conspiracy, for without him, the Fields could not have represented that they had obtained the matching private financing required to obtain the HUD funds. Although he may have been less culpable in some sense than the Field brothers, on this record, Gjerde simply cannot show he was merely a minor participant.

Finally, the district court did not clearly err in finding that Gjerde abused a position of trust in committing this crime. Gjerde was entrusted by the bank's board of directors to conduct the bank affairs in a forthright manner and to assure compliance with bank policies and federal regulations. His position allowed him to structure the loan to CDI through

Minnewaska with little or no scrutiny. A situation like this is exactly what the Sentencing Commission had in mind for the enhancement for abuse of a position of trust. See USSG § 3B1.3, comment. (n.1) (giving as an example "a bank executive's fraudulent loan scheme"). The enhancement for Gjerde's abuse of his position of trust was proper.

III.

For the reasons stated above, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2033MNMI

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Martin Ole Gjerde,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 12, 1997

Order Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

AO 245L (Rev. 3/95) Sheet 1 - Judgment in a Criminal Case

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.

Martin Ole Gjerde

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 4:94CR00041-004

Ronald I. Meshbesher
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) III of the second superseding indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Knowingly and willfully conspiring to defraud the United States	12/13/1989	III

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) IV, V, VIII and IX of the second superseding indictment

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 470-64-7749
Defendant's Date of Birth: 09/01/1950
Defendant's USM No.: 06352-041
Defendant's Residence Address:
P.O. Box 382
Brooten MN 56316
Defendant's Mailing Address:
P.O. Box 382
Brooten MN 56316

04/04/1996
Date of Imposition of Judgment

Signature of Judicial Officer

David S. Doty
U.S. District Judge
Name & Title of Judicial Officer

04/04/1996
Date

A true copy in 6 sheet(s) of the record in my custody.

4-4-96 CERTIFIED 4-4 1996
Francis E. Dosal, Clerk
BY _____ Deputy Clerk

BEST AVAIL

DEFENDANT: Martin Ole Gjerde

CASE NUMBER: 4:94CR00041-004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 33 month(s).

Court orders stay on execution of sentence until May 15, 1996

☒ The court makes the following recommendations to the Bureau of Prisons:
Incarceration at FPC, Duluth, Minnesota

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☒ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

ABLE COPY

DEFENDANT: Martin Ole Gjerde

CASE NUMBER: 4:94CR90041-004

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 year(s)

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Martin Ole Gjerde

CASE NUMBER: 4:94CR00041-004

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall provide the United States Probation Office access to any requested financial information.

Defendant shall not incur any new credit card charges or open additional lines of credit without the approval of the United States Probation Office.

DEFENDANT: Martin Ole Gjerde

CASE NUMBER: 4:94CR00041-004

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 50.00**	**$**	**$ 5,000.00**

☐ If applicable, restitution amount ordered pursuant to plea agreement..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ The interest requirement is waived.
- ☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Minnesota Department of Trade and Economic Development	$102,853.00	$5,000.00	
Totals:	$ 102,853.00	$ 5,000.00	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: Martin Ole Gjerde

CASE NUMBER: 4:94CR00041-004

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____ ; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ In _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

BEST AVA

DEFENDANT: Martin Ole Gjerde

CASE NUMBER: 4:94CR00041-004

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See attachment

Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: I

Imprisonment Range: 33 to 41 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 5,000.00 to $ 50,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 102,853.00

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☒ Partial restitution is ordered for the following reason(s):

The complication and prolongation resulting from an order of full restitution outweighs the need to provide full restitution to the victim.

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

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The court adopts the factual statements contained in the PSR as to which there is no objection. Defendant objects to paragraphs 22, 23, and 24 of the PSR. As to these controverted factual statements, the court resolves the dispute as follows:

1. Defendant objects to paragraph 22 of the PSR which states that Minnewaska Capital, Inc. ("MCI") was used by Clark and Richard Field to funnel money from the Bonanza Valley State Bank ("Bonanza Bank") to Clarkfield Drying, Inc. ("CDI"). Defendant requests that this paragraph be amended to reflect that he had no knowledge that the Fields used MCI to funnel money from Bonanza Bank to CDI.

The evidence presented at trial indicated that defendant initially declined the Fields' request for a loan directly to CDI. Defendant agreed to loan the Fields money only after they incorporated MCI and registered the company in Glenwood, Minnesota. Defendant knew that the Fields were the officers of both MCI and CDI. Defendant neither required the Fields to fill out a loan application nor required any evidence of MCI's financial status. These facts demonstrate that defendant knew the Fields intended to use MCI to funnel funds from Bonanza Bank to CDI. Moreover, defendant's comments on the loan file show that he knew the funds were going to CDI through MCI.

Accordingly, the court finds that paragraph 22 is accurate and it will therefore remain as written.

2. Defendant objects to paragraph 23 of the PSR which states that the loan from Bonanza Bank to MCI "would" be repaid to the bank within six months. Defendant asserts that "would" should be changed to "could" to more accurately reflect the transaction between Bonanza Bank and the Fields. Defendant also asserts that initials at the bottom of the loan comment file demonstrates that Bonanza Bank's loan committee approved the loan to MCI.

The loan comment file was an exhibit at trial. This exhibit indicated that although the loan was payable on demand, Bonanza Valley expected that the loan would be repaid within six months. The issue of committee approval of the MCI loan was not raised by the probation officer and is not relevant to the issue of when the MCI loan was to be repaid. Moreover, none of the individuals whose initials appear on this document corroborated defendant's assertion. Thus, the court concludes that paragraph 23 is correct and accurate as written.

3. Defendant also objects to paragraph 24 of the PSR. Paragraph 24 states that on August 21, 1989, Bonanza Valley advanced a loan in the amount of $292,000 to an MCI checking account. On the same day, these funds were transferred to a CDI checking account and then CDI transferred a check for $173,000 back to Bonanza Bank through MCI.

Defendant's alternative paragraph offered in his position paper is nothing more than an attempt to distance himself from the transaction with the Fields and CDI. Defendant knew that the Fields were funneling funds from Bonanza Valley to CDI. Whether the Fields were acting as officers of MCI or in their personal capacities is irrelevant. Accordingly, based on the evidence presented at trial, the court concludes that paragraph 24 is correct and accurate as written.

APPLICATION OF GUIDELINES TO THE FACTS

The court adopts the guideline calculations contained in the PSR as to which there is no objection. A question of guideline application has arisen with respect to the conclusions contained in paragraphs 36-37, 41, 43-46 and 48. The court resolves these questions as follows:

1. Amount of Loss

Defendant objects to paragraph 41 of the PSR which states that the amount of loss as a result of the instant offense was $282,000. Defendant asserts that the amount of loss is only $102,853, which represents the balance on the $282,000 loan from the City of Clarkfield ("City") to CDI.

Guidelines section 2F1.1, application note 7(b) states:

> In fraudulent loan application cases . . ., the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). . . . However, where the intended loss is greater than the actual loss, the intended loss is to be used.

It is undisputed that the City loaned CDI $282,000 because of the false representations made by the Fields and the defendant that matching funds had been obtained from the Bonanza Bank. The evidence presented at trial conclusively demonstrated that the "loan" from Bonanza Bank to MCI was nothing more than a paper transaction and was part of a larger scheme to defraud the United States. Based on a review of the evidence presented at trial, the court finds that the amount of intended loss in this case is $282,000. Accordingly, the court adopts the loss amount reflected in paragraph 41 and concludes that the probation officer properly applied an 8 level increase to defendant's base offense level pursuant to § 2F1.1.

2. More Than Minimal Planning

The government objects to the probation officer's conclusion in paragraph 41 of the PSR that defendant should not receive a two-level enhancement to his base offense level

for more than minimal planning pursuant to § 2F1.1(b)(2). The government contends that the enhancement is warranted because defendant's actions were more than an isolated act and that he took significant steps to facilitate the commission of the offense and conceal his involvement.

The Guidelines provide that more than minimal planning "means more planning than is typical for commission of the offense in a simple form." § 1B1.1, application note 1(f). For example, in an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. § 1B1.3, application note 1(f). In contrast, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries. Id.

The probation officer focused on defendant's role in the offense, rather than the nature of the offense itself. The language "more than minimal planning" in § 2F1.1(b) (2) focuses on the nature of the offense itself, however, rather than a defendant's role in the offense. See United States v. West, 942 F.2d 528, 531 (8th Cir. 1991). "'More than minimal planning'" is deemed present in any case involving repeated acts over a period of time unless it is clear that each instance was purely opportune." § 1B1.1, application 1(f).

Defendant was convicted of knowingly and willfully participating in a scheme to defraud the United States "from on or about August 1989, and continuing thereafter through on or about December 1989." The evidence presented at trial demonstrated that the offense itself required more than minimal planning. The evidence also overwhelmingly indicated that defendant's fraudulent pattern of activity extended over a period of approximately four months. His actions were complex and thoughtful.

Accordingly, the court finds that defendant's offense was no simple act of opportunism but part of a sophisticated fraud

perpetrated on the United States, the City and the Minnesota Department of Trade and Economic Development ("MDTED"), and entailed more than minimal planning. Thus, the court disagrees with the probation officer and concludes that pursuant to § 2F1.1 a two-level upward adjustment to defendant's base offense level for more than minimal planning is warranted.

3. Minor Participant

The government objects to the probation officer's conclusion in paragraph 43 that the defendant should receive a two-level decrease in his base offense level for being a minor participant in the offense pursuant to § 3B1.2(b). The government contends that although the Fields, criminal activity was more widespread than defendant's, defendant was deeply involved in the conspiracy to defraud the United States. Defendant argues that he was not even a minor participant in the offense, but that he was a minimal participant entitling him to a three or four-level reduction in his offense level pursuant to § 3B1.2(a).

Section 3B1.2(b) provides for a two-level reduction in the offense level if the defendant was a minor participant in the crime. The application notes define a minor participant as "any participant who is less culpable than most other participants, but whose role could not be described as minimal." § 3B1.2, application note 3. To obtain a reduction under this section, a defendant bears the burden of proving he was a minor participant by a preponderance of the evidence. United States v. Thompson, 60 F.3d 514 (8th Cir. 1995). A defendant does not meet this burden by simply showing that he is less culpable than his codefendants, however. Id. at 517.

Defendant was well aware of the Fields' purpose in obtaining the funds from Bonanza Bank and assisted them in obtaining HUD funds. The evidence presented at trial

established that defendant had a complete understanding of the overall criminal activity and played an important role in the conspiracy. The Fields were the impetus behind the scheme to defraud and their activities were more widespread than defendant's. Nonetheless, the fraudulent loan documents, which defendant prepared, were the key pieces of evidence presented at trial. Defendant knew Bonanza Bank was loaning money to CDI through MCI and knew that the Fields needed private financing to obtain HUD funds. Defendant provided false loan documents and convinced the City that the loan was legitimate and would be used to purchase equipment. He knew, however, that the $282,000 was never to leave Bonanza Bank.

Defendant's actions were overt acts in furtherance of the conspiracy which gave rise to criminal liability. Although the Fields may have conspired to defraud the government prior to defendant's involvement in the scheme, until the loan documents were prepared the conspirators had not taken any affirmative steps towards achieving their unlawful goal; defrauding the United States. Without defendant's assistance, the City would not have released the $282,000 to the Fields.

Based on a careful review of the evidence presented at trial, the court finds that defendant played an integral role in the scheme to defraud and that he was an average participant in the instant offense. Accordingly, the court disagrees with the probation officer's conclusion that defendant was a minor participant and concludes that defendant is not entitled to a two-level reduction in his base offense level based on his role in the offense.

4. Abuse of a Position of Trust

Defendant object's to the probation officer's conclusion in paragraphs 44-45 that he abused a position of private trust to facilitate the instant offense warranting two-level upward

adjustment to his offense level. Defendant contends that although he was president of Bonanza Bank, his position did not contribute in a substantial way to the facilitation or concealment of the fraud. Defendant also asserts that this enhancement is not proper because he was not in a position of trust with the United States. Section 3B1.3 provides a two-level enhancement "if the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense." The relevant inquiry under the Guidelines is whether trust is inherent to the nature of the position. United States v. Claymore, 978 F.2d 421 (8th Cir. 1992). Thus, "private trust" refers to a position of private trust characterized by "professional or managerial discretion (i.e. substantial discretionary judgment that is ordinarily given considerable deference) . . . [because] persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature." 3B1.3, application note 1.

Moreover, for the enhancement to apply, "[t]he position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g. by making the detection of the offense or defendant's responsibility for the offense more difficult." § 3B1.3. For example, this enhancement would apply to "a bank executive's fraudulent loan scheme . . . [but] would not apply in the case of an embezzlement or theft by an ordinary bank teller[.]" Id.

The commentary to § 3B1.1 and the facts of this case amply support the conclusion that defendant abused a position of trust. The loan to the Fields would neither have appeared valid nor would have been relied upon by the City if it had been approved by someone without managerial discretion. The City disbursed the funds to the Fields in reliance on the loan documents from Bonanza Bank because the were signed

by the bank president and because defendant had assured the City that the loan was legitimate and would be used to purchase equipment. Because of his position defendant was able to structure the loan with little or no scrutiny. Moreover, his position enabled him to ignore the Bonanza Bank's loan limit policy without immediate consequence.

As president of Bonanza Bank, defendant did occupy a position of trust and he used his position to facilitate the scheme to defraud in a substantial way. See United States v. Brelsford, 982 F.2d 269 (8th Cir. 1992). The court agrees with the probation officer that as president of Bonanza Bank, defendant occupied a position of private trust under § 3B1.3. The record also supports the finding that defendant's position significantly facilitated the commission and concealment of the offense. Accordingly, the court concludes that a two-level enhancement for abuse of trust is warranted.

5. Obstruction of Justice

Defendant objects to the adjustment for obstruction of justice in paragraph 46 of the PSR which increases his base offense level by two levels, as well as the factual statements contained in paragraphs 36 and 37. Section 3C1.1 of the Guidelines provides for a 2 point increase "[i]f the defendant willfully obstructed or impeded or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." The probation officer concluded that this enhancement was warranted because defendant committed perjury at trial.

Lying under oath certainly impedes the administration of justice during the prosecution of a case. United States v. Has No Horse, 42 F.3d 1158, 1159 (8th Cir. 1995). A defendant is subject to an obstruction of justice enhancement if he gives false testimony under oath in regard to a material matter and does so willfully rather than out of confusion or mistake.

United States v. Dunnigan, 115 S. Ct. 1111 (1993). It is not sufficient, however, to enhance a sentence simply because the defendant testifies on his own behalf and the jury disbelieves him. Rather, the court itself must find that the defendant committed perjury. In deciding the issue of perjury, the court examines the alleged false testimony in the light most favorable to the defendant.

The government asserts that defendant testified falsely at trial regarding a number of matters. Specifically, the government argues that defendant lied when he testified that the loan to MCI was legitimate, that he was permitted to exceed Bonanza Bank's lending limit, that he did not withhold any information from City Attorney Kevin Stroup, that the bank intended to disburse the $282,000 to the Fields, that the Fields were not required to fill out a loan application because they had provided MCI's financial statements, that the bank's loan committee approved the loan to MCI and numerous other matters.

The court has considered the alleged false testimony in the light most favorable to defendant. Even under this generous standard, based on the court's observation of the evidence presented at trial and a careful review of the record, it is clear that defendant testified falsely at trial. Defendant testified that the loan the Fields was legitimate. A memorandum written by defendant found in Bonanza Bank's loan file indicated that the loan to MCI was merely a paper transaction and that defendant never intended to disburse the funds to the Fields. This memorandum flatly contradicts defendant's testimony. In the court's view, defendant's testimony was false and was material to defendant's conviction.

This testimony is but one example of the untruths defendant told at trial. Based on the evidence presented at trial, the court concludes that defendant knowingly and willfully gave false testimony at trial in each instance alleged

by the government regarding several material matters in an effort to substantially affect the outcome of the case. Defendant's testimony was not a product of confusion or mistake. Because defendant knowingly committed perjury, the court concludes that a two-level enhancement for obstruction of justice is warranted in this case.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No.: 4-94-41

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	SECOND SUPERSEDING INDICTMENT
MARTIN O. GJERDE,	)	(18 U.S.C. § 371) – (18 U.S.C. § 1341)
Defendant.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:

CONSPIRACY

COUNT I

From on or about August 1989, and continuing thereafter through on or about December 1989, in the District of Minnesota and elsewhere, the defendant,

MARTIN O. GJERDE,

knowingly and willfully conspired, confederated and agreed together with Clark Beach Field and Richard Field a/k/a "Mike" Field and with other persons both known and unknown to the grand jury, to defraud the United States of America of funds belonging to the United States of America's Department of Housing and Urban Development, with the object of the conspiracy being to obtain those funds in the

form of an approximately $282,000 loan from the HUD Small Cities Grant Program by submitting false documentation of additional bank funding in the amount of approximately $292,000 to the administering agency, the Minnesota Department of Trade and Economic Development which processed the applications through the City of Clarkfield, Clarkfield, Minnesota, and which required proof of disbursement of such additional funding before loaning the approximately $282,000 from the HUD Small Cities Grant Program.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the District of Minnesota and elsewhere:

1. On or about August 1989, CLARK BEACH FIELD, RICHARD FIELD a/k/a "Mike" Field and defendant MARTIN O. GJERDE agreed that if defendant MARTIN O. GJERDE, who was Chief Executive Officer of Bonanza State Bank, Brooten, Minnesota, agreed to represent and to create documentation to be presented in support of CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field's application for an approximately $282,000 loan from the HUD Small Cities Grant Program and which falsely purported to loan $292,000 from Bonanza Valley State Bank to the Minnewaska Capital Investments, Inc. of which CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field were officers, knowing that CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field would represent that they or Clarkfield Drying, Inc. would borrow the $292,000 from Minnewaska Capital Investments, Inc. and thus obtain the additional funds required by the HUD Small Cities Grant Program that the Minnesota Department of Trade and Economic Development was to administered. In exchange for

defendant MARTIN O. GJERDE's false representations, CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field agreed to deposit the proceeds obtained from the HUD Small Cities Grant Program in a bank account in the name of Clarkfield Drying, Inc. at the Bonanza Valley State. In addition, CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field agreed to pay to Bonanza Valley State Bank funds which were to represent interest paid on the fictitious loan.

2. On or about August 7, 1989, CLARK BEACH FIELD as President of Clarkfield Drying, Inc. signed an installment note and security agreement wherein Clarkfield Drying, Inc. purportedly borrowed $292,000 from Minnewaska Capital Investment, Inc.

3. On or about August 21, 1989, RICHARD FIELD a/k/a "Mike" Field and CLARK BEACH FIELD as President and treasurer, respectively, of Minnewaska Capital Investment, Inc. signed a promissory note wherein Minnewaska Capital Investment, Inc. purportedly borrowed $292,000 from Bonanza Valley State Bank.

4. On or about August 16, 1989, accounts were opened at Bonanza Valley State Bank in the names of Clarkfield Drying, Inc. and Minnewaska Capital Investment, Inc.

5. On or about August 24, 1989, Minnewaska Capital Investment, Inc. was incorporated with the Secretary of State of Minnesota. The incorporator listed with the Secretary of State is Richard W. Field.

6. On or about August 25, 1989, defendant MARTIN O. GJERDE caused to appear a credit of approximately $292,000 to Minnewaska Capital Investment, Inc. bank checking account, and on the same day purportedly caused to appear a transfer of the entire $292,000 from the Minnewaska Capital Investment, Inc. bank checking account. However, defendant MARTIN O. GJERDE directed bank employees that the loan proceeds were never to leave the bank, and to

effectuate that end he caused to have holds placed on the accounts of Minnewaska Capital Investment, Inc. and Clarkfield Drying, Inc.

7. On or about August 28, 1989, CLARK BEACH FIELD represented to the City of Clarkfield that CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field on behalf of Clarkfield Drying, Inc. had obtained $292,000 in loan proceeds from Bonanza Valley State Bank.

8. On or about August 28, 1989, Kevin Stroup, on behalf of the City of Clarkfield, telephoned defendant MARTIN O. GJERDE to inquire into the disbursement of the $292,000 in loan proceeds to Clarkfield Drying, Inc., and was told by defendant MARTIN O. GJERDE that said proceeds has been disbursed to Minnewaska Capital Investment, Inc. which had then disbursed the funds to Clarkfield Drying, Inc. Defendant MARTIN O. GJERDE did not advise Mr. Stroup that he had directed that those loan proceeds not be available to either Minnewaska Capital Investment, Inc. or to Clarkfield Drying, Inc. because holds had been placed on both accounts and the purported loan proceeds were not permitted to leave Bonanza Valley State Bank.

9. On or about August 28, 1989, defendant MARTIN O. GJERDE signed and caused to be delivered a letter to Kevin Stroup which enclosed the false loan documents between Bonanza Valley State Bank and Minnewaska Capital Investments, Inc.

10. On or about December 12, 1989, approximately $282,000 in loan proceeds from the HUD Small Cities Grant Program were disbursed by the Minnesota Department of Trade and Economic Development through the City of Clarkfield to Clarkfield Drying, Inc.

11. On or about December 12, 1989, the approximately $282,000 in loan proceeds from the HUD Small Cities Grant Program which had been deposited into F & M State Bank of Clarkfield account of Clarkfield Drying, Inc. On or about the

same day, CLARK BEACH FIELD withdrew approximately $232,000 of those loan proceeds and deposited them into the Clarkfield Drying, Inc. checking account at Bonanza Valley State Bank.

12. On or about December 13, 1989, CLARK BEACH FIELD caused to be paid by Clarkfield Drying, Inc. to Bonanza Valley State Bank approximately $3500 purportedly as "interest" on the fictitious $292,000 transaction to Minnewaska Capital Investment, Inc.

13. On or about January 1, 1990, Clarkfield Drying, Inc. defaulted on the HUD Small Cities Grant Program loan.

All in violation of Title 18, United States Code Section 371.

MAIL FRAUD

COUNTS II - V

SCHEME AND ARTIFICE

CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field, on behalf of Clarkfield Drying, Inc., made application to the City of Clarkfield, Minnesota for a HUD Small Cities Grant Program loan in the amount of approximately $282,000 in order to establish Clarkfield Drying, Inc. as a whey drying plant. As part of the application, CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field proposed that funds in addition to that applied for would be necessary for the operation of the plant including the purchase of equipment for the operation of the plant, and the City of Clarkfield thus conditioned the approval of the loan on proof that said additional funding had been obtained and that the identified equipment be purchased. Unable to obtain the necessary additional funding, CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field

entered into with defendant MARTIN O. GJERDE a scheme and artifice to defraud and to obtain money by means of false pretenses from HUD which was providing the funding through the City of Clarkfield. The scheme entailed CLARK BEACH FIELD and RICHARD FIELD a/k/a "Mike" Field creating a straw company called Minnewaska Capital Investment, Inc. which applied for a loan from Bonanza Valley State Bank through defendant MARTIN O. GJERDE who was Chief Executive Officer. The loan documents were made to appear to lend $292,000 to Minnewaska Capital Investment, Inc., and the accounts at Bonanza Valley State Bank in the names of Minnewaska Capital Investment, Inc. and Clarkfield Drying, Inc. were made to appear as if the funds were deposited in the Minnewaska Capital Investment, Inc. account and then transferred to the Clarkfield Drying, Inc. account. This false documentation was created to be used in support of the application for the HUD loan. In fact, while Bonanza Valley State Bank monies were placed in the accounts of Minnewaska Capital Investment, Inc. and Clarkfield Drying, Inc. pursuant to the scheme, holds were placed on those accounts at the direction of defendant MARTIN O. GJERDE and the release of those monies was never authorized. Accordingly, neither Minnewaska Capital Investment, Inc. nor Clarkfield Drying, Inc., had access to those monies and they were never truly borrowed from Bonanza Valley State Bank. Further, CLARK BEACH FIELD falsely represented to the City of Clarkfield that the equipment, which was required to be purchased with the $292,000 additional bank funding, had been purchased.

THE MAILINGS

COUNT II

On or about the 28th day of August, 1989, in the District of Minnesota, the defendant,

MARTIN O. GJERDE,

having devised the above-described scheme and artifice to defraud and to obtain money by means of false pretenses, for the purpose of executing and in order to effect the scheme and artifice to defraud and to obtain money, did knowingly cause to be sent, delivered, and moved by the United States Postal Service a letter dated August 28, 1989, to Kevin Stroup, Attorney for City of Clarkfield, Minnesota, from Martin O. Gjerde, Chief Executive Officer, Bonanza Valley State Bank, and which pertained to the forwarding of loan documents between Bonanza Valley State Bank and Minnewaska Capital Investments, Inc.

All in violation of Title 18, United States Code Sections 2 & 1341.

COUNT III

On or about the 29th day of September, 1989, in the District of Minnesota, the defendant,

MARTIN O. GJERDE,

having devised the above-described scheme and artifice to defraud and to obtain money by means of false pretenses, for the purpose of executing and in order to effect the scheme and artifice to defraud and to obtain money, did knowingly cause to be sent, delivered, and moved by the United States Postal Service a letter dated September 29, 1989, from Kevin Stroup,

Attorney for City of Clarkfield, Minnesota, to Nancy Johnson, Minnesota Department of Trade and Economic Development, forwarding for approval of the HUD Small Cities Grant Program loan, documentation pertaining to the false loan between Bonanza Valley State Bank and Minnewaska Capital Investments, Inc. and from Minnewaska Capital Investments, Inc. to Clarkfield Drying, Inc.

All in violation of Title 18, United States Code Sections 2 & 1341.

COUNT IV

On or about the 2nd day of November, 1989, in the District of Minnesota, the defendant,

MARTIN O. GJERDE,

having devised the above-described scheme and artifice to defraud and to obtain money by means of false pretenses, for the purpose of executing and in order to effect the scheme and artifice to defraud and to obtain money, did knowingly cause to be sent, delivered, and moved by the United States Postal Service a letter dated November 2, 1989, from Kevin Stroup, Attorney for City of Clarkfield, Minnesota, to Nancy Johnson, Minnesota Department of Trade and Economic Development forwarding for approval of the HUD Small Cities Grant Program loan Minnewaska Capital Investment, Inc.'s agreement to subordinate its rights to the City of Clarkfield, and which referred to a consent to subordinate which was being considered by Bonanza Valley State Bank.

All in violation of Title 18, United States Code Sections 2 & 1341.

COUNT V

On or about the 30th day of November, 1989, in the District of Minnesota, the defendant,

MARTIN O. GJERDE,

having devised the above-described scheme and artifice to defraud and to obtain money by means of false pretenses, for the purpose of executing and in order to effect the scheme and artifice to defraud and to obtain money, did knowingly cause to be sent, delivered, and moved by the United States Postal Service a letter dated November 30, 1989, from Kevin Stroup, Attorney for City of Clarkfield, Minnesota, to Nancy Johnson, Minnesota Department of Trade and Economic Development informing her that Bonanza Valley State Bank, Brooten, Minnesota had disbursed $292,000 of loan proceeds to Clarkfield Drying, Inc. and that all of that money had been spent by Clarkfield Drying, Inc. as required by the HUD Small Cities Grant Program Agreement.

All in violation of Title 18, United States Code Sections 2 & 1341.

(2)

Supreme Court, U.S.
FILED
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CLERK

No. 97-265

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARTIN O. GJERDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General
JOHN C. KEENEY
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14 pp

QUESTION PRESENTED

Whether the evidence showed that the federal government was the target of petitioner's fraudulent scheme, such that it was sufficient to sustain petitioner's conviction for conspiring to defraud the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 110 F.3d 595.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1997. A petition for rehearing was denied on May 12, 1997. Pet. App. A23. The petition for a writ of certiorari was filed on August 11, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was

convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. He was sentenced to 33 months' imprisonment, to be followed by two years of supervised release, and was ordered to pay $5,000 in restitution. The court of appeals affirmed. Pet. App. A1-A22.

1. The evidence at trial showed that Congress appropriates money to the Department of Housing and Urban Development (HUD) for the Community Development Block Grant Program, which includes the Small Cities Grant Program. HUD provides the Small Cities Grant Program funds to the States, which in turn make the funds available to communities to foster economic development. The Minnesota Department of Trade and Economic Development (MDTED) is the Minnesota agency in charge of disbursing the HUD funds in accordance with HUD rules and regulations. Pet. App. A3.

Clark and Richard Field controlled Clarkfield Drying, Inc. (CDI), a Minnesota corporation located in Clarkfield, Minnesota. On behalf of CDI, the Fields approached the City of Clarkfield about a $282,000 loan through the Small Cities Grant Program for the purchase of equipment for the operation of a whey drying plant. In their grant application, the Fields stated that they would need an additional $292,000 of private financing to be successful. MDTED informed the City that, before releasing the funds for a loan to CDI, it would need proof through a loan commitment letter that CDI had obtained the private financing. In addition, the funding agreement between CDI and the City of Clarkfield required CDI to prove that the money obtained privately had been spent on CDI

equipment and that the City would be in the first security position with respect to the equipment. Pet. App. A3.

Thereafter, the Fields sought a $292,000 loan from the Bonanza Valley State Bank to provide private financing for CDI. Petitioner, the president of the bank, refused to lend the funds to CDI in part because Clarkfield was outside the bank's service area. The Fields then created a corporation named Minnewaska Capital Investment, Inc. (Minnewaska), a holding and leasing company for CDI located within the bank's service area. They approached petitioner for a $292,000 bank loan to Minnewaska. Petitioner approved the loan without requiring the Fields to submit a loan application or evidence of Minnewaska's financial status. Pet. App. A4.

After the bank issued the loan, Minnewaska immediately transferred the $292,000 to CDI. Within a minute of that transfer, CDI paid $173,000 back to Minnewaska, which then repaid that amount to the bank. The remainder of the loan proceeds was left in CDI's checking account, but petitioner put a hold on the Minnewaska and CDI checking accounts, preventing the Fields from gaining access to the proceeds of the loan. Accordingly, the loan proceeds were never available for use by CDI. Pet. App. A4-A5.

In September 1989, Kevin Stroup, an attorney for the City of Clarkfield, told petitioner that, in order to obtain the HUD funds, the Fields were required to secure $292,000 in private financing and to show that the proceeds of the private financing were used to buy CDI equipment. Petitioner informed Stroup that the bank had lent $292,000 to Minnewaska, he provided records documenting the loan, and he represented that approximately $170,000 of the bank loan had been

spent on equipment for CDI. Petitioner never informed Stroup that $173,000 of the loan proceeds had been repaid to the bank, or that he had placed holds on the CDI and Minnewaska checking accounts to ensure that the remaining proceeds did not leave the bank. Later, petitioner falsely confirmed to Stroup that CDI had spent all of the proceeds of the bank loan on equipment, and that the CDI account had a zero balance. Pet. App. A5-A6.

Based in significant part on petitioner's assurances that the bank loan had been spent on equipment, MDTED authorized the release of funds from the Small Cities Grant Program to the City, which in turn lent $282,000 to CDI. Within three months of the execution of the loan, the Fields repaid the balance of the bank loan. CDI eventually defaulted on the Small Cities Grant Program loan, however. Pet. App. A6. A certified public accountant hired by the City to trace the program funds lent to CDI concluded that the bank loan did not satisfy CDI's obligation to obtain private financing in order to qualify for the HUD funds, and described the loan as "a bogus transaction with no actual capitalization to the corporation." *Id.* at A7.

2. Petitioner was convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. On appeal, petitioner contended, insofar as pertinent here, that the evidence was insufficient to support his conviction because the conspiracy was not one to defraud the United States or an agency of the United States. Rather, he argued, the City of Clarkfield was the victim of the fraud because the money fraudulently borrowed by the Field brothers belonged to the City. The court of appeals rejected that contention. Pet. App. A11-A13.

The court of appeals observed that, under *Tanner* v. *United States*, 483 U.S. 107, 130 (1987), the government was required to prove that the United States or one of its agencies was the target of the conspiracy. It noted, however, that "[a] conspiracy targeted at the United States or one of its agencies may be achieved by using third parties to effect the conspiracy, because section 371 does not limit the method by which the conspirators may plan to defraud the United States." Pet. App. A12. After reviewing the evidence at trial, the court held that "a reasonable jury could have concluded that the target of the conspiracy was HUD, as represented by MDTED, the state agency that administered the HUD Small City Grant Program funds." *Ibid.* The court explained that, although HUD granted the Small Cities Grant Program funds to the State of Minnesota, that grant was subject to substantial federal regulation. See *ibid.* (citing 42 U.S.C. 5304-5321 and 24 C.F.R. 570.420-570.432)). Based on that extensive federal regulation, the court concluded that MDTED "was acting as an agent of HUD, and any conspiracy to defraud MDTED * * * was in effect a conspiracy against HUD itself." Pet. App. A13. The court added that "[petitioner] and the Fields used the city to perpetrate their fraud against HUD, but this does not alter the conclusion that the object of their conspiracy was to defraud HUD in order to obtain the federal funds." *Ibid.*

The court also rejected petitioner's claim that there was no violation of Section 371 because the State rather than the federal government imposed the "matching-funds" requirement. Noting that Section 371 prohibits both conspiracy to commit offenses against the United States and conspiracy to defraud

the United States, the court held that, "[w]hile allegations of a conspiracy to commit an offense against the United States would require proof of an agreement to violate a federal statute or regulation, allegations under the other conspiracy clause, that is, a conspiracy to defraud the United States, do not engender the same requirement." Pet. App. A13.

ARGUMENT

Petitioner contends that the evidence was insufficient to support his conviction for conspiracy to defraud the United States because the City of Clarkfield, not the United States, was the target of the fraudulent scheme. Relying exclusively on *Tanner* v. *United States*, 483 U.S. 107 (1987), petitioner argues that a city receiving federal financial assistance through a state agency is not an agent of the United States for purposes of Section 371. That contention provides no basis for a challenge to the validity of petitioner's conviction, which is fully consistent with *Tanner*.

Tanner involved loans guaranteed by the Rural Electrification Administration (REA) for the construction of a power plant for Seminole Electric Cooperative, Inc. (Seminole). Seminole's procurement manager conspired with a friend to steer contracts to the friend's construction company in return for kickbacks. The procurement manager and the owner of the construction company were charged with conspiring to defraud the United States in violation of Section 371. The government's theory was that, because Seminole's construction project received federal financial assistance and because the REA supervised some of the construction, a conspiracy to defraud Seminole was equivalent to a conspiracy to

defraud the United States. See 483 U.S. at 130 ("The Government argues that, because Seminole received financial assistance and some supervision from the United States, a conspiracy to defraud *Seminole* is *itself* a conspiracy 'to defraud the United States.'"). The Court rejected that argument, and held that a conspiracy to defraud a private corporation receiving financial assistance from the federal government does not constitute a conspiracy to defraud the United States. *Id.* at 129-132. The Court added, however, that conspiracies to defraud the federal government may be accomplished through innocent intermediaries, *id.* at 129, and the Court remanded the case to determine whether the defendants conspired to cause Seminole to make misrepresentations to the REA, *id.* at 132.

This case is markedly different from *Tanner*. In *Tanner*, the target of the defendants' fraudulent kickback scheme was Seminole. The federal government had only an incidental role in the power plant project as guarantor of the construction loans. That role, the Court concluded, could not transform the scheme into a fraud against the United States, for otherwise any conspiracy to defraud an entity or person receiving federal assistance would fall within Section 371. See 483 U.S. at 132.

In this case, by contrast, HUD was the primary target of petitioner's scheme, the object of which was to obtain federal Small City Grant Program funds fraudulently. It is of no consequence that the HUD Small City Grant Program was administered by MDTED, a state agency. Under the statute governing the program, a State may elect to distribute the HUD funds, as Minnesota has done, but in the absence of such an election by a State, HUD distributes

the program funds itself. See 42 U.S.C. 5306(d)(2); 24 C.F.R. 570.420(a). Accordingly, a state agency such as MDTED, charged with distributing HUD funds under the Small City Grant Program in an electing State, performs the same role that HUD performs directly in non-electing States. A scheme to obtain HUD funds fraudulently through MDTED in Minnesota is no less a fraud against HUD than is a scheme to obtain federal funds directly from HUD in a non-electing State.

Nor is it dispositive that petitioner made his misrepresentations to the City of Clarkfield, rather than MDTED directly. The City conveyed and was expected to convey those misrepresentations to MDTED, which, in reliance on the misrepresentations, authorized release of funds from the Small City Grant Program to the City for payment to CDI. Pet. App. A6. Although the misrepresentations were made directly to the City, the purpose and the effect of the misrepresentations were to induce fraudulently the release of federal funds from MDTED. Such fraudulent actions fall well within the scope of Section 371; in *Tanner*, the Court made clear that conspiracies to defraud the federal government may be punished under Section 371 even when they are accomplished through innocent intermediaries. 483 U.S. at 129.

Petitioner emphasizes (Pet. 10-11) that HUD's disbursement of funds to MDTED through the Small City Grant Program took the form of a grant rather than a loan, and argues that HUD no longer had any stake in the funds after they were granted to MDTED. The fact that the federal payment initially had the form of a grant disbursed to MDTED did not deprive the funds of their federal character for purposes of Section 371. In cases construing the statute

prohibiting the theft of any "money[] or thing of value of the United States," 18 U.S.C. 641, courts have suggested that, when an "outright grant is paid over to the end recipient, utilized, commingled or otherwise loses its identity, the money in the grant ceases to be federal." *United States* v. *Hope*, 901 F.2d 1013, 1019 (11th Cir. 1990), cert. denied, 498 U.S. 1041 (1991). But courts have also held that "while identifiable funds appropriated for use in a federal program are in transit between their federal source and their intended recipient and are still subject to substantial federal controls, they remain federal funds." *Hope*, 901 F.2d at 1019; see also *United States* v. *Smith*, 596 F.2d 662, 664 (5th Cir. 1979).

The court of appeals therefore correctly concluded that the Small City Grant Program funds obtained fraudulently by petitioner retained their federal character. At the time of the fraud, the HUD funds were still in the possession of MDTED, a state agency charged with distributing them to their end recipients pursuant to a federal objective, and that federal grant was still subject to substantial federal regulation under 42 U.S.C. 5304-5321 and 24 C.F.R. 570.420-570.432. Cf. *Hope*, 901 F.2d at 1016, 1019 (funds advanced by county, as grantee of HUD, to nonprofit organization formed to administer economic development program, in anticipation of immediate federal reimbursement and for purposes governed by federal statutes and regulations, were federal funds); *United States* v. *Brown*, 742 F.2d 359 (7th Cir. 1984) (funds disbursed by county as grantee of HUD to an operator of programs for the disadvantaged were federal funds within reach of 18 U.S.C. 641, because of the accountability both of the subgrantee to the grantee and of the grantee to HUD for the proper

disbursement of block grant funds intended for federally sanctioned purposes).

Contrary to petitioner's contention (Pet. 12), neither the fact that he was ordered by the district court to pay restitution to Minnesota rather than to HUD, nor the fact that only the City of Clarkfield and not the United States filed a claim in connection with CDI's bankruptcy proceeding, proves that HUD no longer had a stake in the Small City Grant Program funds once they passed to the State. The federal government's interest in recovery of the fraudulently obtained funds is fully served by restoration of the funds to the State for further distribution in accordance with the requirements of the federal program.

In any event, the government need not show that HUD incurred a direct financial loss as a result of the conspiracy in order to establish that it was a target of the fraud. As the Court stated in *Tanner*, if a defendant's "actions constituted a conspiracy to impair the functioning of [a federal agency], no other form of injury to the Federal Government need be established for the conspiracy to fall under § 371." 483 U.S. at 128. When federal grant program funds are, as a result of a conspiracy to defraud, disbursed by a state agency charged with administering the program to a party not entitled to receive them, the function of the program is necessarily impeded and the federal government is properly regarded as a target of the fraud.*

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* The indictment alleged that petitioner conspired with the Fields to "defraud the United States * * * of funds belonging to [HUD]." Pet. App. A42. In finding that petitioner engaged in a conspiracy fraudulently to obtain HUD funds, the jury necessarily concluded that he conspired to impair the lawful

Finally, it is not significant that MDTED rather than HUD imposed the "matching-funds" requirement. MDTED imposed the requirement to ensure that any disbursement to CDI of HUD funds would achieve the objective of the Small City Grant Program of facilitating community development in small cities. Petitioner's fraudulent scheme to evade MDTED's "matching funds" requirement targeted HUD funds and sought to impede the Small City Grant Program no less than if the requirement had been imposed by HUD itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
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Attorney

OCTOBER 1997

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functioning of HUD. The indictment was not required to make that objective explicit.